81-2190

No.

Office - Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES EMORY HALL, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(No. 80-3497)

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QUESTIONS PRESENTED FOR REVIEW

The District Court entered a Summary Judgment in favor of the United States and against Petitioner, individually, under 26 USC §6672 as a responsible officer for failure to pay over taxes withheld from employees of James Emory Hall Contractors, Inc., a corporation. The Court failed to allow Petitioner to assert (in a counter affidavit to the government's Motion for Summary Judgment) a defense that the government itself failed by its misrepresentation, breach of contract, and negligence to collect these taxes from corporate assets. The Ninth Circuit Court of Appeals affirmed this decision.

The questions thereby arising are:

1. Petitioner was unable to appear personally at the Corporation's bankruptcy to establish a priority and is also precluded from raising a misrepresentation, negligence, estoppel or breach of contract issue on the 6672 proceedings against him personally. Thus, he has no forum to present the issues and thereby is deprived of Due Process of Law under Article V of the constitution.

2. The decision of the Ninth Circuit is in direct conflict with the Seventh Circuit case of *Holcomb v. United States*, 543 F.2d 1185 (7th Cir. 1976).

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No.

JAMES EMORY HALL, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(No. 80-3497)
(DC No. CV 78-2012 U.S. District Court Idaho)

JAMES EMORY HALL, Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit. The Judgment on the case is dated and was filed February 24, 1982. A Petition for Rehearing was filed March 4, 1982 and was denied March 22, 1982.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals was noted as not for publication. It is reproduced as Appendix A, infra p. A-1. The Court affirmed a Summary Judgment in favor of the United States. The case was consolidated with another case (Chatel) for purposes of the opinion.[1]

[1]The two original Defendants in the case were James Emory Hall Contractors, Inc. and James Emory Hall. Only James Emory Hall (personally) filed an appeal and requests review on Certiorari. The consolidated case is *Louis E. Chatel v. U.S.*, No. 80-3460 (Western District of Washington.)

JURISDICTION

The Jurisdiction of the Court is invoked under Supreme Court Rule 17, 28 USC §1651. This Petition for Certiorari is filed within the time allowed.

QUESTIONS PRESENTED

The District Court entered a Summary Judgment in favor of the United States and against Petitioner, individually, under 26 USC §6672 as a responsible officer for failure to pay over taxes withheld from employees of James Emory Hall Contractors, Inc., a corporation. The Court failed to allow Petitioner to assert (in a counter affidavit to the government's Motion for Summary Judgment) a defense that the government itself failed by its misrepresentation, breach of contract, and negligence to collect these taxes from corporate assets. The Ninth Circuit Court of Appeals affirmed this decision.

The questions thereby arising are:

1. Petitioner was unable to appear personally at the Corporation's bankruptcy to establish a priority and is also precluded from raising a misrepresentation, negligence, estoppel or breach of contract issue on the 6672 proceedings against him personally. Thus, he has no forum to present the issues and thereby is deprived of Due Process of Law under Article V of the constitution.

2. The decision of the Ninth Circuit is in direct conflict with the Seventh Circuit case of *Holcomb v. United States,* 543 F.2d 1185 (7th Cir. 1976).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment Five.

"No person shall . . . be deprived of life, liberty or property, without due process of law."

26 USC 6672; 26 USC 7323(f)

STATEMENT OF FACTS

Petitioner was the President and shareholder of James Emory Hall Contractors, Inc., a corporation engaged in logging primarily in Idaho. The Corporation accumulated large delinquent Federal Withholding taxes. It had assets to pay the delinquent taxes and was allowed to continue to operate by the Internal Revenue Service. Liens were filed by the Internal Revenue Service, but in the wrong state.

In addition, and pursuant to a written Agreement with the District Director of Idaho, Petitioner was to cause the Corporation to pay $2.00 per thousand to the Internal Revenue Service based on board feet of logs removed from the forest and delivered to the purchaser. This sum was to retire the delinquent withheld taxes.

After the written agreement was executed by the Idaho District Director and the Corporation, the Corporation went into bankruptcy proceedings in 1971. The Bankruptcy Judge held that the Internal Revenue Service liens were supposed to be filed in Washington State, not Idaho, pursuant to 26 USC 6323(f), thus giving priority to other secured creditors.

As a result, other creditors got the proceeds from the Corporation assets, not the Internal Revenue Service, and Petitioner's personal 6672 liability to the Internal Revenue Service was not paid by the Corporation's assets.

Next, the Bankruptcy Trustee and the Internal Revenue Service, voluntarily and without consideration, abandoned the $2.00 per thousand payment agreement in the operation of the company under Bankruptcy Chapter 11. Petitioner personally was again powerless to cause this money to be applied to a corporate debt to eliminate his potential personal liability under 26 USC 6672.

REASONS FOR GRANTING THE WRIT

1. The Petitioner personally had no forum to appear and argue his defenses to the 6672 liability as the Ninth Circuit Case of *Securities and Exchange Commission v. Securities Northwest, Inc.*, 573 F.2d 622 (9th Cir. 1978) holds unequivocally that a shareholder-officer cannot appear in a corporate bankruptcy proceeding to question priorities that would affect his 26 USC §6672 liability. The Ninth Circuit in the instant proceeding holds that failure to honor a written contract and government negligence by filing liens in the wrong state by the Internal Revenue Service cannot be raised by a shareholder-officer to defeat a Summary Judgment Motion in a proceeding pursuant to 6672.

Therefore, it is an inescapable conclusion that the Internal Revenue Service activities causing a dissipation of corporate assets available to pay withheld taxes can never be questioned by a responsive officer where a corporate bankruptcy occurs. This is a deprivation of due process.

2. Conflict of Circuits.

The Ninth Circuit in this decision (Appendix I) and *Teel v. U.S.*, 529 F.2d 903 on 906 (9th Cir. 1976) states clearly "A proceeding under 6672 deals with a totally independent liability from that of a corporation" and this cannot be a factual question presented in a proceeding against the responsible officer under 6672.

In *Holcomb vs. U.S.*, 543 F.2d §1185 (7th Cir. 1976), the Seventh Circuit in a 6672 case held that a counterclaim based on misrepresentation and estoppel required reversal of the Summary Judgment. The Court stated on 1188-9 "... Whether this is either true or sufficient grounds for estopping the government we cannot say. The meager facts before us indicate that the matter may well turn out to be an estoppel.... In light of these considerations we do not believe that Summary Judgment was appropriate in this case. As the Supreme Court held in *Poller v. Columbia Broadcasting Company*, 368 U.S. 464, 467, 82 S.Ct. 486, 488, 7 L.Ed.2d 458 (1962), the Summary Judgment "rule authorized Summary Judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is (and where) no genuine issue remains for trial ... (for) the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' "

There is a conflict among the Circuits as to whether defenses of misrepresentation, breach of contract or other defenses may be raised in a 6672 proceeding, and thus preclude Summary Judgment if genuine issues of fact exist.

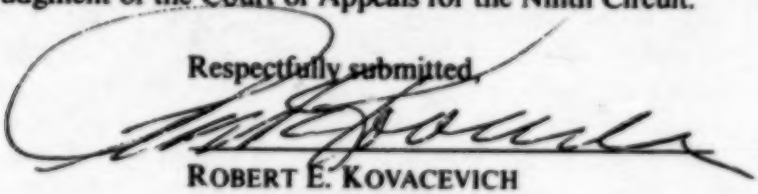
A person who can be assessed by the Internal Revenue Service under 6672 in a summary ex parte proceeding and wiped out of all his net worth, on forced non-judicial sale should at least be able to argue a defense of misrepresentation, breach of contract, or estoppel by the government to preclude a Summary Judgment, especially since this court has held that such a debt is not dischargeable in a personal bankruptcy. *U.S. v. Sotelo*, 436 U.S. 268, (1978).

Petitioner does not here request a decision in his favor as to the issues, only a right to be heard as to these issues. To date, he has been given no forum to raise the issues.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,



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Dated: May 17, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS E. CHATEL,
PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE.

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

JAMES EMORY HALL CONTRACTORS, INC.;
JAMES EMORY HALL and JAMES W. GIVENS, Trustee,
DEFENDANT-APPELLANT.

No. 80-3460
DC No. CV 76-518V
No. 80-3497
DC No. CV 78-2012

MEMORANDUM

Argued and submitted — January 6, 1982

Decided — February 24, 1982

Chatel v. USA on Appeal from the United States District Court
for the Western District of Washington
Honorable E. Gordon West, District Judge, Presiding
USA v. Hall on Appeal from the United States District Court
for the District of Idaho
Honorable Ray McNichols, District Judge, Presiding

Before: ANDERSON and ALARCON, Circuit Judges, and
REDDEN*, District Judge.

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*The Honorable James A. Redden, United States District Judge for the District of Oregon, sitting by designation.

These are two actions[1] in which the taxpayers, Louis E. Chatel and James Emory Hall, appeal the imposition of penalty assessments under 26 USC §6672. The statute provides that a "responsible person" in a corporation shall collect, account for and pay over to the United States the federal income and social security taxes withheld from corporate employees. The "responsible person" who "willfully" refuses to perform these duties is personally liable for the full amount due and unpaid with interest charged from the date of assessment. The personal liability of the "responsible person" is totally independent of the corporation's liability. *Teel v. United States*, 529 F.2d 903, 906 (9th Cir. 1976).

For an individual to be liable under section 6672, two things must be established: (1) that the individual is the "responsible person" and (2) that the individual willfully refuses to pay the tax. *Id.* at 905. Willful in this context is defined as "voluntary, knowing and intentional even though it is not done with a bad purpose or an evil motive. . . ." *Barnett v. United States*, 594 F.2d 219, 222 (9th Cir. 1979). Voluntarily, consciously and intentionally preferring "other creditors over the United States constituted willful failure to pay over." *Teel v. United States*, 529 F.2d at 905, *quoting Sorenson v. United States*, 521 F.2d 325, 328 (9th Cir. 1975).

The taxpayers each conducted a corporate business that went into bankruptcy. Both taxpayers agree that they are the "responsible person" within the meaning of the statute, but argue that the entry of summary judgment in favor of the government was erroneous. Summary judgment is appropriate if there is "no genuine issue as to any material fact" and the movant is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

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[1]These separate appeals arise from separate districts. They involve similar legal issues and are therefore consolidated for disposition in a single memorandum.

Chatel argues that his waiver of the statute of limitations is ineffective and, hence, the government's assessment is not timely. He is incorrect. Chatel signed the waiver within the statutory period and upon the advice of counsel. The waiver operated to delay the imposition of the penalty and therefore benefitted him by delaying the accrual of interest on the penalty.

Both taxpayers rely, in part, on an estoppel theory. Chatel argues that the government's failure to attend a meeting of creditors and its failure to object to the bankruptcy court's allowing the government to recover less than its full claim estops the government from imposing the penalty on him.

Hall argues that the government's failure to object to the bankruptcy court's setting aside the assignment of certain profits to the government and the government's improper filing of its liens estops the government from imposing the penalty on him. Hall also argues that because the government acquiesced in the Corporation's delayed payments and because he relied on the government's representations that the liens had been properly filed, there are questions of fact which preclude the entry of summary judgment. We disagree with the arguments of both taxpayers. In *Teel v. United States*, our circuit rejected a similar argument:

> Finally, the appellants argue that because the government failed to exercise a priority of its lien over the assets of the Corporation in the receivership proceedings, it should be estopped from collecting the penalty from the appellants. A proceeding under Sec. 6672 deals with a totally independent liability from that of the corporation. The failure to exercise any rights in the proceeds does not establish an estoppel. . . .

529 F.2d at 906.

Hall relies on *Holcomb v. United States*, 543 F.2d 1185 (7th Cir. 1976) to argue that the assessment of the penalty is error because the government had agreed in writing to protect him from personal liabilty for the Corporation's liability. The reliance is misplaced. In *Holcomb*, the taxpayers alleged that the government had agreed to apply bankruptcy receipts to the

personal liability of the taxpayers and had breached that agreement. 543 F .2d at 1187. In contrast, Hall's agreement pertains solely to the corporate debt and corporate penalties; it does not refer to Hall's personal assessment under section 6672. We reiterate that with the passage of section 6672, Congress created a personal liability which is separate and distinct from the liability of the corporation.

In both of these cases the grant of summary judgment was not error. The judgements of the respective district courts are affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

JAMES EMORY HALL CONTRACTORS, INC.;
JAMES EMORY HALL and JAMES W. GIVENS, Trustee,
DEFENDANTS-APPELLANT.

No. 80-3497

ORDER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

Before: ANDERSON and ALARCON, Circuit Judges, and REDDEN, District Judge.*

Appellant's petition for rehearing is denied.

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*The Honorable James A. Redden, United States District Judge for the District of Oregon, sitting by designation.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2190

JAMES EMORY HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision below, sustaining the imposition of liability against him pursuant to Section 6672 of the Internal Revenue Code of 1954 (26 U.S.C.), as a person responsible for seeing that taxes withheld from the wages of corporate employees were paid over to the government, and holding that the government was under no obligation to protect him from personal liability by litigating the validity of its claim relating to the withheld taxes against the corporation in corporate bankruptcy proceedings.

The pertinent facts may be summarized as follows: During the relevant period, James Emory Hall Contractors, Inc., was engaged in the business of logging and road construction, and became delinquent in the payment of with-

holding taxes (CR 25 at 1-2).[1] According to his affidavit filed in the district court, in 1968, petitioner, who was the president and a principal shareholder of the corporation, informed the Internal Revenue Service of the delinquencies (CR 25 at 1-2). Early in 1971, the Internal Revenue Service began seizing corporate property to satisfy these liabilities (CR 25 at 3). In May 1971, petitioner met with representatives of the Internal Revenue Service to discuss the unpaid taxes. As a result of the meeting, the corporation agreed to assign to the government a part of the proceeds of certain logging contracts, and petitioner agreed to guarantee personally the payment of the taxes, in exchange for the government's agreement to release its levies and forbear collecting the taxes (CR 25 at 3-4; CR 25, Exh. 1; CR 17, Exh. J).

Shortly thereafter, on May 11, 1971, the corporation filed a petition for reorganization pursuant to Chapter X of the Bankruptcy Act (CR 1 at 2; CR 25 at 4). In September 1971, petitioner agreed to modify the earlier agreement (CR 25 at 4-5). In relevant part, the modified agreement provided that petitioner would use his best efforts to see that the corporation paid its tax liabilities and petitioner unconditionally promised to pay the remaining corporate liabilities within 18 months after the termination of reorganization or liquidation proceedings (CR 25, Exh. 5; CR 17, Exh. B). On December 30, 1971, the corporate reorganization proceedings were converted to a liquidating bankruptcy (CR 1 at 2). On May 15, 1972, the bankruptcy court sustained the contention of competing creditors that the government was not entitled to payment of its tax claim as a secured creditor, because notice of its tax liens had been filed in the wrong

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[1] "CR" refers to the docket control numbers assigned to the documents in the original record by the Clerk of the District Court, followed, where necessary, by the appropriate page references.

place (CR 25, Exh. 7). The corporate assets were liquidated and the proceeds were distributed to creditors (CR 18 at 1). The liabilities involved here remained unpaid (CR 18 at 2)[2]

In the trial court, petitioner admitted that he was responsible under Section 6672 for seeing that the withholding taxes were paid. Nevertheless, he sought to avoid the entry of judgment against him on various theories that the government had breached a duty to him to pursue the assets of the corporation.[3] The district court granted summary judgment in favor of the government, and the court of appeals affirmed (Pet. App. A-1 to A-4).

1. The decision below correctly held that the government is not precluded from collecting liabilities assessed pursuant to Section 6672 against a responsible person, when the taxes can no longer be collected directly from the corporation. The courts of appeals have uniformly rejected the argument that the government is under an obligation to protect a responsible person from his Section 6672 liability. *Teel* v. *United States*, 529 F. 2d 903 (9th Cir. 1976) (the government is under no duty to exercise priority in a corporate receivership proceeding, rather than collect trust fund taxes from the responsible person); *Bernardi* v. *United States*, 74-1 U.S. Tax Cas. para. 9170 (N.D. Ill. 1973), opinion adopted, 507 F. 2d 682 (7th Cir. 1974), cert. denied, 422 U.S. 1042 (1975) (the government is not required to pursue

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[2]On April 21, 1972, the Internal Revenue Service made an assessment of $518,465.56 against petitioner (CR 1 at 5).

[3]Petitioner argued, *inter alia*, that the government was precluded from obtaining judgment against him because it had not appealed the adverse ruling of the bankruptcy court concerning the government's priority in the corporate bankruptcy proceedings, that the government was not entitled to judgment against him because it did not comply with the agreements it entered with him which, in his view, required it to file notices of tax liens in the correct jurisdiction, and that the District Director lacked authority to enter the agreements with petitioner.

its rights in corporate bankruptcy proceedings as a condition to collecting Section 6672 liabilities); *Datlof* v. *United States*, 370 F. 2d 655 (3d Cir. 1966) (the government is under no duty to assert its rights in a foreclosure proceeding against corporate assets, but may seek instead to collect from the person responsible for seeing that the taxes were paid); *Cash* v. *Campbell*, 346 F. 2d 670 (5th Cir. 1965) (the government is not required to look to corporate funds in an interpleader action for payment, rather than the responsible person); see also *Monday* v. *United States*, 421 F. 2d 1210 (7th Cir.), cert. denied, 400 U.S. 821 (1970); *Hornsby* v. *Internal Revenue Service*, 588 F. 2d 952 (5th Cir. 1979).[4]

Contrary to petitioner's argument (Pet. 5), the decision below does not conflict with *Holcomb* v. *United States*, 543 F. 2d 1185 (7th Cir. 1976). That case does not hold that the government is under a duty to protect a responsible person from liability, or to forgo collection of the taxes from him. Instead, the court in *Holcomb* held that summary judgment against the responsible persons was inappropriate because there were material questions of fact regarding, *inter alia*, whether the government had agreed to apply sums received from the corporation first to the trust fund portion of its unpaid liabilities, which would have had the effect of reducing the amount of the assessment against the responsible persons. The Seventh Circuit's subsequent

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[4]The case law is consistent with the published policy of the Internal Revenue Service to use Section 6672 to collect the revenue from the responsible person only if the taxes cannot be collected directly from the corporation. Thus, an assessment will not be made against a responsible person at a time when there are corporate assets which may be seized and applied to its unpaid tax liabilities. The Service will abate an assessment against the corporation *pro tanto*, when the corporation is involved in court proceedings and the responsible person has made payments to satisfy his Section 6672 liability. Policy Statement P-5-60 (Handbook, Policies of the Internal Revenue Service, IRM 1218 (1 Administration, Int. Rev. Man. (CCH) para. P-5-60, at 1305-15 (1977))).

opinion, after a decision on remand, makes it clear that its view is in accord with the decision in this case. In that subsequent opinion, the court stated that absent some express agreement to do so, the government was under no obligation to protect the responsible person from his liability by applying sums it received from the corporation to the trust fund portion of its tax liability. *Holcomb* v. *United States*, 622 F. 2d 937, 942 (1980).

2. Petitioner further asserts (Pet. 4-5) that the decision below deprived him of his right to due process secured by the Fifth Amendment by denying him a forum in which to present his claims. But petitioner was afforded a forum in which to present his various contentions that the government breached some duty owed to him. His arguments, however, were rejected as defenses to liability, as a matter of law.[5] In these circumstances, summary judgment was entirely appropriate and deprived petitioner of nothing to which he was entitled.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1982

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[5]For example, petitioner urged below that by failing to file notices of its tax liens in the proper jurisdiction to protect its claim against competing corporate creditors, the government breached the written agreements it entered with petitioner. But the agreements, which were submitted to the trial court, contained no promise by the government to file notices of its liens and, thus, provided no factual support for petitioner's position.

DOJ-1982-07